No. 89-381

In The

Supreme Court of the United States

October Term, 1989

STATE OF MAINE,

Petitioner,

v.

PAUL WING, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

RESPONDENTS' BRIEF IN OPPOSITION

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10 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATEMENT OF THE CASE

This case arises from the warrantless entry by officers of the Kennebec County Sheriff's Department onto property owned by Respondent Paul Wing and occupied by Mr. Wing and Respondent Patricia Magagnoli.

The Wing property consists of approximately 4.5 acres of primarily wooded land in Litchfield, Maine. The wooded areas surround a clearing that contains a house, a garage, and a landscaped lawn area, all of which cannot be seen from the public highway. Entry onto the property is gained by means of a single driveway, which Paul Wing constructed. Mr. Wing purposely placed a bend or curve in this driveway so as to obstruct the view of his property from the public road and assure his privacy. In addition, he selectively cleared trees from his property with these same purposes in mind. *Appendix to Petition for Writ of Certiorari* at 5, 22-23 (hereinafter referred to as App. at ___ .).

Approximately 100 feet onto the property, Mr. Wing's driveway divides into a fork. The left branch leads to Mr. Wing's house, the right branch to his garage and lawn area. The lawn area is landscaped and contains a gazebo and a barbecue pit, as well as picnic tables and lawn chairs. *App.* at 4-5. Mr. Wing and Ms. Magagnoli used this lawn area for social and recreational activities, including hosting picnics, sunbathing (occasionally in the nude), and engaging in sexual relations. *App.* at 23.

In its statement of the case, Petitioner asserts that "[i]n the course of driving to the end of the right branch" of Mr. Wing's driveway, the officers saw marijuana growing. *Petition for Writ of Certiorari* at 5. The suppression

Justice made no such finding. In his decision, he found: "The officers took the driveway to the right and parked the car on the grassy area . . . . The driveway ended at the grassy area. The officers saw before them what appeared to be marijuana plants . . . ." *App.* at 22.

SUMMARY OF ARGUMENT

Given the factual findings of the suppression Justice, Question 1, as set forth by Petitioner, is not raised by this case. Petitioner seeks review of the legality of observations made by police officers from the driveway of Paul Wing. The trial court, however, found that the officers did not see marijuana until they had travelled beyond the end of the driveway and parked upon a grassy area that the Court determined to be curtilage. Thus, this case presents no observation from a driveway for the Court to review.

Even if the trial court's findings could be construed to include observations from the driveway, the holding that such observations were made in violation of the curtilage does not conflict with decisions of other state and federal courts. The rationale for a diminished expectation of privacy in driveways rests on the utilization of driveways by members of the public approaching a home to do business with its occupants. Even accepting Petitioner's version of the facts, the observations in this case were made from the driveway leading to a garage, not the driveway leading to the home over which members of the public might be expected to travel to approach the residence for legitimate purposes.

The suppression Justice correctly applied the *Dunn* analysis to the instant case. Moreover, given the idiosyncratic nature of Mr. Wing's rural property, this case provides little opportunity for useful elaboration of the analytical framework set forth in *Dunn*.

REASONS FOR DENYING WRIT

I. THE ISSUE PRESENTED IN QUESTION 1, AS SET FORTH BY PETITIONER, IS NOT RAISED BY THIS CASE, AND EVEN IF RAISED, WAS NOT DECIDED BY THE STATE COURT IN A WAY THAT CONFLICTS WITH THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

A. The Officers Made No Observations from Mr. Wing's Driveway.

Question 1, as set forth by Petitioner, addresses the constitutionality of observations made by police officers from Mr. Wing's property. As a basis for raising this issue, Petitioner's *Statement of the Case* asserts that the officers observed marijuana "[i]n the course of driving to the end of the right branch" of Mr. Wing's driveway. The suppression Justice found, however: "The officers took the driveway to the right and parked the car on the grassy area . . . . The driveway ended at the grassy area. The officers saw before them what appeared to be marijuana plants. . . ." *See App.* at 22. Although not explicit, the sequence and structure of the Justice's findings imply that the officers did not see any marijuana until they had progressed beyond the driveway and onto the grassy

area. Accordingly, this case presents no issue regarding observations made from a driveway.

B. Even Assuming Petitioner's Interpretation of the Suppression Justice's Findings, the Decision of the State Court Does Not Conflict With Those of Other State and Federal Courts.

Petitioner contends that the decision of the Maine Supreme Judicial Court affirming the suppression of evidence in this case conflicts with the decisions of other state and federal courts regarding the legality of observations made from driveways. This assertion must be judged in light of two principles underlying the constitutional analysis of police observations made from driveways. First, driveways are semiprivate areas with respect to which the extent of fourth amendment protection will depend on the circumstances of each individual case. *United States v. Magana*, 512 F.2d 1169, 1171, (9th Cir.), *cert. denied*, 423 U.S. 826 (1975). Second, the diminished expectation of privacy in a driveway derives from the expectation that members of the public with legitimate business to conduct with a homeowner will use the driveway as a means of approach, whether they be salesmen, pollsters, or police. *United States v. Roberts*, 747 F.2d 537, 543 (9th Cir. 1984).

In the instant case, Petitioner admits that any observations made from the driveway (assuming the police made such observations) were made from the right branch of the driveway leading to the garage. Only the left branch of the driveway leads to Mr. Wing's home. Accordingly, even members of the public having business at the Wing residence would have no reason to proceed

up the right branch. The rationale for a diminished expectation of privacy in this portion of the driveway simply does not apply.

The state and federal court decisions cited by Petitioner as in conflict with the State Court decision in the instant case all deal with police observations made while on the normal and direct route of approach to the home. *See Petition for Writ of Certiorari* at 11-14 and cases cited therein. Given the factual distinction in the instant case, i.e. the portion of driveway in question was not the normal or direct route of access to the home, the finding of a greater expectation of privacy in the instant case in no way conflicts with the decisions cited by Petitioner.

II. THIS CASE REPRESENTS NEITHER A MISAPPLICATION OF *DUNN* NOR AN OPPORTUNITY TO REFINE THE ANALYSIS SET FORTH IN THAT CASE.

In *United States v. Dunn*, ___ U.S. ___ , 107 S. Ct. 1134, 1139 n.4 (1987), the Supreme Court rejected an invitation to lay down a bright-line test for identifying the curtilage. Rather, the Court set forth a four-factor analysis to be applied to the circumstances of each case. Nothing can be said here to improve upon the suppression Justice's reasoned and faithful application, set forth at pages 39-44 of the *Appendix to Petition for Writ of Certiorari*, of the *Dunn* test to the facts of this case. It will suffice to address two points raised by Petitioner with respect to the trial court's analysis.

First, Petitioner notes that a person located in the wooded area of the Wing property, arguably an area akin

to open fields, could see into the area identified as curtilage. The suppression Justice, however, emphasized Mr. Wing's use of woods, through the design of his driveway and the selective cutting of trees, as a natural enclosure ensuring privacy. While it is possible that one located in the woods could see into the clearing, the Court's findings reflect the reasonableness of Mr. Wing's belief that such an enclosure, in a rural Maine setting, would in fact provide privacy. Moreover, an area does not lose its status as curtilage simply because one situated outside the curtilage may see into it. For example, in airplane overflight cases, Courts have not held that the area viewed is not curtilage; rather they held simply that the viewer did not intrude upon the curtilage in gaining his vantage point. *See, e.g., California v. Ciralo*, 476 U.S. 207 (1986); *United States v. Bassford*, 812 F.2d 16 (lst Cir. 1987). In this case, the officers physically intruded upon the curtilage.

Second, Petitioner points to the distance between Mr. Wing's house and lawn and to the location of trees and a rockwall between the two. Of course, this factor does not favor the finding of curtilage. Nevertheless, the Supreme Court has refused to lay down any bright-line test because numerous factors figure into the curtilage analysis. Accordingly, and contrary to Petitioner's assertion, no single factor controls.

Finally, this case presents the type of unique situation that calls for reasoned application of the analytical framework set forth in *Dunn*. Because of its uniqueness, the case presents little opportunity to provide additional guidance to courts analyzing the curtilage question. On the other hand, the obvious relevance and helpfulness of the *Dunn* factors to the curtilage analysis of this very

unique situation demonstrate that the *Dunn* framework remains useful and adequate. Nothing could be gained from further discussion of the issue in the context of this case.

CONCLUSION

For the reasons set forth above, Respondents Paul Wing and Patricia Magagnoli respectfully pray that the Petition for a Writ of Certiorari to the Maine Supreme Judicial Court be denied.

Respectfully submitted,

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